CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 1191

THE PEOPLE OF THE STATE OF ILLINOIS, EX REL., CHARLES A. PUSCH, vs. MICHAEL F. MULCAHY, Sheriff of Cook County, and EDWARD EISENBERG, Messenger of the Governor of California.	Habeas Corpus.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

Petitioner Charles A. Pusch, the above named relator, a resident of the County of Cook and State of Illinois, sued out a petition for a writ of *habeas corpus* in the Criminal Court of Cook County, Illinois, to contest the legality of the warrant of the Governor of Illinois, wherein he was alleged to be a fugitive from justice of the State of California, in which state he had been indicted for the crime of burglary, alleged to have been committed on the 11th day of July, A. D. 1944.

Summary Statement.

It is the contention of petitioner that he was not within the State of California on the 11th day of July, A. D. 1944, as shown by the record, and that unless proof had been submitted to the court on the trial of his petition for writ of *habeas corpus* by at least one witness for the People, the sworn testimony of the petitioner was sufficient to overcome the recital in the Governor's warrant as to the petitioner being a fugitive from justice from the State of California.

The Trial and Judgment.

The petitioner, Charles A. Pusch, was arrested in Chicago, Cook County, Illinois, charged with being a fugitive from justice from the State of California, under and by virtue of a certain warrant issued by His Excellency, Dwight H. Green, for the rendition of petitioner into the State of California.

The People offered in evidence the Governor's Warrant, to the introduction of which objection was made by petitioner's attorney, and the objection was overruled (Rec. 19), and thereupon the Governor's Warrant was received in evidence by the Court and marked Exhibit 1, and thereupon the People rested their case (Rec. 19).

Whereupon the relator was duly sworn and testified that he was not in the State of California on the 11th day of July, 1944, as shown by his testimony (Rec. 22, 23, 24 and 25).

The only evidence offered by the People against petitioner's sworn testimony denying absolutely that he was not in California on the 11th day of July, 1944, was the testimony of Michael Egan, a police officer, who testified

to an alleged conversation with the petitioner, to which objection was made and overruled (Rec. 27 to 33).

Appeal from the judgment of the Criminal Court of Cook County, Illinois, was taken, petitioner thereupon released on bail in the sum of one thousand dollars in cash, with Maudena M. Pusch (mother) as surety.

Thereupon the cause was appealed to the Supreme Court of Illinois and the judgment of the Criminal Court was affirmed.

The order of affirmance is as follows:

"This writ of error has been sued out to review the judgment of the criminal court of Cook County denying a writ of *habeas corpus* and remanding plaintiff in error to the custody of the agent of the State of California on an extradition warrant. Plaintiff in error urges but one point, that is, that there is no proof in the record to refute his evidence that he was not in the State of California on the date named in the Governor's warrant, to-wit, July 11, 1944.

The Governor's warrant received in evidence recites that plaintiff in error was a fugitive from justice. The warrant, otherwise regularly and duly prepared and authenticated, declares that plaintiff in error was charged with the crime of burglary on July 11, 1944.

Plaintiff in error testified in his own behalf stating that he was in Las Vegas, Nevada, on July 11, 1944, and he insists here that as defendant in error failed to produce any witnesses who testified that they saw him in the State of California on July 11, 1944, his testimony must be taken as conclusive and it was error not to discharge him.

Under the law of this State it is the duty of the Governor of this State to first determine whether plaintiff in error was a fugitive from justice. (*People ex rel. Chevlin* v. *O'Brien,* 372 Ill. 640; *People ex rel. Buxton* v. *Jeremiah,* 364 Ill. 274.) In determining that fact, the Governor may consider any proof which reasonably tends to establish either that the petitioner was or was not a fugitive from justice. *Munsey* v. *Clough,* 196 U. S. 364, 49 L. ed. 515; *People ex rel. Stanton* v. *Meyering,* 345 Ill. 598; *Roberts* v. *Reilly,* 116 U. S. 80, 29 L. ed. 544.

The rendition warrant constitutes *prima facie* evidence that relator was a fugitive from justice. (*People* v. *O'Brien,* 372 Ill. 640; *People ex rel. Wortman* v. *Munie,* 354 Ill. 490; *People ex rel. Stevens* v. *Meyering,* 349 Ill. 198.) In this case a question of fact, whether plaintiff in error was a fugitive from justice from California, was raised by the pleadings. The Governor's warrant was his expression of satisfaction that there was sufficient evidence that plaintiff in error was such a fugitive. This constitutes a *prima facie* case against the plaintiff in error in a *habeas corpus* proceeding. It is an established rule of law that one held under a Governor's warrant will not be discharged where the evidence on the hearing on the question of his presence in or absence from the demanding State, is merely contradictory. (*People* v. *O'Brien,* 372 Ill. 640; *Lacondra* v. *Hermann,* 343 Ill. 608; *Munsey* v. *Clough,* 196 U. S. 364, 49 L. ed. 515.) To entitle one to his release on *habeas corpus* it must appear from the evidence, beyond a reasonable doubt, that the relator was without the demanding State when the alleged offense was committed. *State of Carolina* v. *Bailey,* 289 U. S. 412, 77 L. ed. 1292.

In the case before us there was no proof sufficient to overcome the *prima facie* proof that plaintiff in error

was in the State of California on the date charged in the Governor's warrant. It was not error to deny the writ. The judgment of the criminal court of Cook county is affirmed.

Judgment Affirmed."

Jurisdiction.

Jurisdiction of the United States Supreme Court to Review the Judgment of the Supreme Court of Illinois.

This Court has jurisdiction to review because a Federal Constitutional question is raised, petitioner having been prosecuted under Section 5278 of the Revised Statutes of the United States, as shown by the record, and definitely ruled on by the Supreme Court of Illinois adversely to the contention of petitioner.

Question Presented.

The question presented upon the face of the record is:

Whether petitioner has been deprived of his liberty without due process of law under the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States, in that Section 5278 of the Revised Statutes of the United States requires positive proof of the presence of a fugitive in the demanding state on the day specified in the warrant of rendition and accompanying papers.

Reasons Relied Upon for Allowance of Writ.

The decision of the Supreme Court of Illinois affirming the judgment of the Criminal Court of Cook County is contrary to the requirements of due process of law.

ARGUMENT.

The question presented by this record is: Can a citizen be rendited from Illinois to the State of California for an alleged crime supposed to have been committed by him therein, in a proceeding where he positively testified that he was not in the State of California on the day when the crime was alleged to have been committed, and the People offer no competent evidence that he was in such state on that particular day?

In the opinion rendered by the Supreme Court of Illinois, it is said by the Court:

> "It is an established rule of law that one held under a Governor's warrant will not be discharged where the evidence on the hearing on the question of his presence in or absence from the demanding state is merely contradictory."

We respectfully refer this Honorable Court to the state of the evidence. Pusch positively denies that he was within the State of California on the 11th day of July, 1944 Rec. 22 to 25), *and not a single witness testified that he was in California on that day*—the People merely offering the evidence of a police officer whose testimony was purely hearsay (Rec. 26 to 33).

Sustaining the contention of petitioner that unless the People offer some positive testimony that the alleged fugitive was in the demanding state on the day when the crime was committed, the testimony of an alleged fugitive must be taken as true, we cite the well considered case of *Hyatt* v. *Corkran,* 188 U. S. 691, where this Honorable Court held:

"The indictment in this case named certain dates as the times when the crimes were committed, and where in a proceeding like this there is no proof or offer of proof to show that the crimes were in fact committed on some other day than those named in the indictment, and that the dates therein named were erroneously stated, *it is sufficient for the party charged to show that he was not in the State at the times named in the indictments,* and when those facts are proved so that there is no dispute in regard to them, and there is no claim of any error in the dates named in the indictments, *the facts so proved are sufficient to show that the person was not in the State when the crimes were, if ever committed.* * * *

"The language of Section 5278, Rev. Stat., provides, as we think, that the act shall have been committed by an individual who was at the time of its commission *personally present* within the State which demands his surrender. * * * It is difficult to see how a person can be said to have fled from the State in which he is charged to have committed some act amounting to a crime against the State, *when in fact he was not within the State at the time the act is said to have been committed. How can a person flee from a place that he was not in?* * * *

"We think the plain meaning of the Act requires such presence, and that it was not intended to include, as a fugitive from justice of a state, *one who had not been in the State at the time when, if ever, the offense was committed, and who had not, therefore, fled therefrom.*" (Italics ours.)

The proceeding to rendite a citizen from his asylum state to another is a proceeding of a highly penal nature and should be strictly construed.

In re Ryan, et al., 36 New York Supp., pp. 888-890, it was held:

"To be a fugitive from justice, and therefore subject to extradition, it must appear by proof or necessary inference that the prisoner was within the de-

> manding state at the time of the commission of the crime with which he was charged." * * *

and in *In re White,* 55 Fed. 44, on page 55, it was held:

> "* * * And it is proper to inquire whether the prisoner was in fact within the demanding state when the alleged crime was committed; for if he were not, it could not be properly held that he had fled from it."

The proposition involved in this proceeding is so plain that it does not require further citation of authorities to sustain the absolute right of petitioner to his liberty, and we therefore most respectfully say that the judgment of the Supreme Court of Illinois, affirming the judgment of the Criminal Court of Cook County, operates to deprive petitioner of his liberty without due process of law, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States, and we therefore pray that the Petition for Writ of Certiorari should be allowed.

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